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Chrill Care, Inc. and Home Health Care, 1199, AF-SCME, National Union of Hospital & Health Care Employees, AFL-CIO. Case 22-RC-12218

November 20, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 1, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a stipulated election agreement. The tally of ballots in a unit of approximately 412 eligible voters shows 174 for and 170 against the Union with no challenged ballots.

The Board has reviewed the record in light of the exceptions¹ and briefs and has adopted the hearing officer's findings² and recommendations,³ and finds that a certification of representative should be issued.

1. We agree with the hearing officer that the Employer presented insufficient credible evidence to support its Objection 2, which alleged that the Union engaged in objectionable conduct by photographing employees who came to the Employer's premises to vote in the election. The only evidence introduced regarding photography in the vicinity of the Employer's premises was vague and contradictory. The evidence shows only that four indi-

viduals were milling in the vicinity, and some were taking photographs. Only one of the individuals was even alleged to be a union agent. The record does not establish that this individual took photographs. Further, there was no credited evidence identifying who or what was being photographed. Consequently, the record is devoid of credited evidence that any of the voters were actually photographed or were aware of any photographs being taken. Clearly, this vague and contradictory evidence of photography on the day of the election does not support a finding of objectionable conduct. Because we find no credible evidence that union agents took any photographs or that unit employees were aware of any photography, we reject the Employer's reliance on *Mike Yurosek & Sons*, 292 NLRB 1074 (1989).⁴

2. We adopt the hearing officer's recommendation to overrule Objection 3, which alleged that the Union engaged in objectionable conduct by picketing or otherwise demonstrating on the date of the election at the Employer's place of business, thus blocking or intimidating employees who appeared to vote, and by recording the names of employees who appeared to vote.

(a) Regarding the Union's conduct on the day of the election, we agree with the hearing officer's finding that there is no evidence that any unit employee's access to the building, the Employer's premises, or the voting area was inhibited or blocked more than momentarily. Union supporters and agents outside the Employer's premises displayed union signs and insignia, made pronoun statements, and attempted to speak to employees entering the area. Although there is some evidence that union supporters may have touched employees in an effort to engage them in conversation, there is no evidence of any forceful or violent contact or similar threatening harassing contact. The union supporters respected employees' requests to be left alone. As we find elsewhere in this decision, there was no other credible evidence of objectionable conduct. Thus, the Union's conduct outside the premises on election day did not reasonably tend to interfere with employees' access to the polling place. See *Comcast Cablevision of New Haven*, 325 NLRB 833, 837 (1998).

(b) Regarding the allegation of note taking or recording of voter's names, it is the Board's well-established policy that keeping a list of names, apart from the official voting list, is generally prohibited. However, the Board generally does not find such list making coercive in the absence of evidence that employ-

¹ In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Objections 4 and 5.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957). We have carefully examined the record and find no basis for reversing the findings.

The Employer has excepted to the hearing officer's decision, asserting that the decision evidences bias and prejudice. Upon our full consideration of the entire record in these proceedings, we find no evidence that the hearing officer prejudged the case, made prejudicial rulings, or demonstrated bias against the Employer in his conduct of the hearing or his analysis and discussion of the evidence.

In finding the Union's conduct unobjectionable, Chairman Battista and Member Liebman do not rely on the hearing officer's characterization of some of the Employer's witnesses as hypersensitive or over-reactive.

³ We adopt the hearing officer's recommendation to overrule Objection 1, as we find, in agreement with the hearing officer, that the Employer has not adduced sufficient credible evidence to support its contention that the Union engaged in intimidating or coercive conduct.

⁴ We do not foreclose the possibility that photography by nonagents, in the context of other conduct, could be objectionable under the "third party" standard. See *Westwood Horizons Hotel*, 270 NLRB 802 (1984).

ees knew their names were being recorded. *A. D. Julliard & Co.*, 110 NLRB 2197, 2199 (1954); *Locust Industries*, 218 NLRB 717 fn. 2 (1975); *Crock Wire & Cable Group, Inc.*, 273 NLRB 1041 (1984).

Here, no eligible voter testified to having witnessed anyone recording names or other information. The only witnesses who testified that they observed union organizers recording anything were not unit employees, including the Employer's security contractor and union organizers. Moreover, the hearing officer credited testimony that the list keeping by union agents was conducted circumspectly, and a short distance away from the premises where the election was held. Thus, he found no basis in the record to infer that any eligible voter witnessed the list keeping. It follows that no eligible voter could have been coerced by the Union's conduct. Accordingly, we agree with the hearing officer that the recording of names or other information was unobjectionable.

3. We also adopt the hearing officer's recommendation to overrule Objection 6. There, the Employer alleged that the Union threatened, intimidated, and coerced employees by infiltrating and disrupting the Employer's offsite employee meetings during the preelection period, and by demonstrating outside the Employer's facility on election day. The Employer characterizes this conduct as a challenge to its property rights and asserts that the Union "objectively left employees with the impression that management could not stop the force of the Union, thus employees were likewise powerless to resist." We find no merit in these contentions.

The Employer first argues that the Union engaged in objectionable conduct at the Employer's offsite meeting at a local restaurant about 2 weeks before the election. In this regard, the evidence shows that union organizer Ramjas briefly disrupted the meeting and initially resisted the Employer's efforts to eject her, but was ultimately persuaded to leave once the police were called. Gail Ahern, the Employer's director of operations, apologized to the assembled employees for Ramjas' disruptive conduct; and Jerry Fernandez, the Employer's labor consultant, asked employees, "[I]s that the kind of person you want representing you?" We agree with the hearing officer that, rather than give employees the impression that the Employer was powerless against the force of the Union, this incident would be more likely to convince employees that the Employer was fully able to maintain control. Accordingly, we agree with the hearing officer that employees witnessing Ramjas' conduct would not reasonably have felt coerced in the exercise of their free choice in the election. If anything, as the hearing officer found, Ahern's and Fernandez' measured re-

sponse to Ramjas's disruptive conduct more likely made Ramjas appear to be an embarrassment, if not a "laughing stock," and a poor reflection on the Union.⁵

The Employer also contends that union representatives engaged in objectionable conduct by refusing to leave the Employer's premises on the day of the election. The hearing officer rejected this argument, finding that the Union's actions took place either on public property or on property owned by the United Way, which leases space to the Employer. In exceptions, the Employer claims that, under New Jersey law, it does have the right to exclude nonemployee union organizers from its leased premises.

We find no merit in this argument. First, the record does not clearly establish that the Union's activity about which the Employer complains took place on property under the control of either the building owner or the Employer. Accordingly, the Employer's reliance on arguments regarding its asserted exclusory property rights in the premises is misplaced. Second, the only time the Employer even alleges that the building owner asked the union supporters to leave,⁶ the credited evidence shows that they did. According to the Employer, they returned later, but there is no evidence that either the Employer or the building owner attempted to remove them thereafter. Indeed, the Employer does not even allege that it ever asked the union supporters to leave the premises or that it asked the building owner to remove them. Third, there is no evidence that the union supporters' conduct was witnessed by any eligible voters. Thus, the record does not support the Employer's contention that the conduct in question could have given voters the impression that the Employer was powerless to resist the Union's intrusions onto its premises.

The Employer argues that *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), compels a finding that the Union's conduct was objectionable. We disagree. The facts in the case are plainly distinguishable from those presented here. In *Phillips Chrysler Plymouth*, union agents entered the employer's premises shortly before the voting was scheduled to begin, belligerently refused to stop

⁵ The Employer argues that Ramjas' conduct must be found objectionable absent offsetting misconduct by the Employer. There is no basis for that argument. The fact that the Employer did not engage in misconduct does not mean that Ramjas' conduct was objectionable. Cf. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986), setting forth a nine-factor test for assessing whether a party's conduct warrants setting aside an election.

We do not condone Ramjas's disruptive behavior. We simply find, under all the circumstances, that this incident, however undesirable and offensive, was insufficient to warrant overturning the election.

⁶ Contrary to the Union, the evidence regarding this request is not hearsay.

talking to employees in the shop area, engaged in a shouting match with the employer in the presence of employees, and refused to leave even after the police arrived. The Board found that the union agents' conduct interfered with the election by indicating to employees that the employer was unable to protect its own property rights in a confrontation with the Union. Here, by contrast, neither Ramjas nor the union supporters on election day ultimately refused to leave the premises occupied by the Employer: when requested to leave, they left. Some union supporters returned to the Employer's premises later on election day but were apparently not asked to leave thereafter.⁷ Thus, employees would not reasonably conclude that the Employer was unable to protect its legal rights in a confrontation with the Union.⁸

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Home Health Care, 1199, AFSCME, National Union of Hospital & Health Care Employees, AFL-CIO, and that it is the exclusive collective-

⁷ See *Edward J. DeBartolo Corp.*, 313 NLRB 382, 383 (1993).

⁸ Indeed, as stated above, there is no evidence that any eligible voter witnessed the union supporters' actions on election day.

bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time certified home health aides employed by the Employer at its Montclair, New Jersey facility, but excluding all other employees, office clerical employees, managerial employees, registered nurses and other professional employees, guards and supervisors, including HR coordinators and client service coordinators, as defined in the Act.

Dated, Washington, D.C. November 20, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD